

Khruapanich (Migration) [2023] AATA 147 (18 January 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Miss Supawadee Khruapanich
CASE NUMBER:	1833565
HOME AFFAIRS REFERENCE(S):	BCC2016/3151870
MEMBER:	David Crawshay
DATE:	18 January 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl.820.211 of Schedule 2 to the Regulations; and • cl.820.221 of Schedule 2 to the Regulations; and • r.2.03A.

Statement made on 18 January 2023 at 11:41am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – de facto relationship for at least 12 months – pooling of financial resources – shared overseas holidays – registered relationship – physical care and support – decision under review remitted

LEGISLATION

Acts Interpretation (Registered Relationships) Regulations 2008
Migration Act 1958, ss 5, 65
Migration Regulations 1994, Schedule 2, cls 820.211, 820.221; rr 1.09, 2.03
Relationships Act 2008 (Vic)

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 22 September 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied that the applicant was the de facto partner of the sponsor at the time of application. The delegate also found that the applicant did not meet r.2.03A because the parties had not been in a de facto relationship for at least the 12-month period ending immediately before the date of the application.
4. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

5. The issues in the present matter are whether the applicant was the de facto partner of the sponsor at the time of application and continues to be his de facto partner at the time of this decision. The applicant must also meet the criterion in r.2.03A relating to de facto relationships.

Whether the parties are in a spouse or de facto relationship

6. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

Are the parties in a de facto relationship?

7. "De facto partner" is defined in 5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2). In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.
8. The Tribunal notes that the visa application was refused on the basis of there being insufficient evidence, including insufficient evidence of social recognition by family, friends and the wider community, as well as insufficient evidence of the parties meeting the 12-

month de facto requirement. However, it also notes that, since this time, it has been in receipt of a large amount of information, including:

- Statements from the parties' personal and joint bank accounts;
- Correspondence addressed to one or both parties at an address in Bell Post Hill;
- Form 888 statutory declarations and other statements from the parties' family, friends and colleagues;
- Photographs of the parties in various settings;
- Posts from the applicant's social media account;
- Numerous documents associated with travel in Australia and overseas
- A detailed relationship statement (undated) and a later statement dated 22 December 2022; and
- A relationship certificate dated 12 January 2023.

9. Importantly, much of this information is dated from a time that precedes or is around the time of the visa application and therefore provides a contemporaneous record of the parties' relationship. The Tribunal considers that this additional information is directly relevant when considering the matters under r.1.09A and ultimately whether the definition of "de facto partner" in s.5CB is met and whether the additional criterion relating to de facto relationships in r.2.03A is present. It will forward some, although not all, of this information to the Department when remitting the matter.

Financial aspects of the relationship

10. Based on the evidence in front of it, the Tribunal finds that the parties do not have any joint ownership of real estate or other major assets, nor do they have any joint liabilities. Based on statements from the parties personal and joint bank accounts, it finds that the sponsor is paid his income – disability support pension payments – into his personal bank account and that payments are then made from this account into the applicant's account (either by way of electronic transfer or physically by depositing into her account at a branch). In an undated letter that was submitted on 29 November 2018, the parties said that the reason for opening an Australian account in the applicant's name was to facilitate payments from the sponsor into this account which would allow her to pay her mortgage in Thailand and to clear her credit card debts. In a later statement dated 20 December 2022, the parties stated that they did not open a joint bank account because there was no need to as they were "steady" in their financial situations. They have since opened a joint account, and although it contains a fairly substantial amount of money, the origin of this money is unclear. Moreover, the parties do not appear to have been depositing their incomes into this account. The applicant has also since found employment, although the income from her job appears to be paid into her personal account. Having considered the above information and findings, the Tribunal accepts that there is some pooling of the parties' financial resources and this is given weight.
11. The Tribunal has considered evidence of the financial aspects of the parties' relationship and accepts that it leans slightly in favour of them being in a genuine and continuing relationship.

Nature of the household

12. The parties do not have any children of their relationship. No weight is accorded either way.
13. As to the parties' living arrangements, they have provided several pieces of correspondence addressed to one or both of them at an address in Bell Post Hill. Although the Tribunal accepts that much, if not all, of this correspondence can be generated and sent without any (or any rigorous) verification process, it has also had regard to other evidence, such as the undated letter submitted on 29 November 2018. This letter stated that the parties lived under the same roof wherever possible. The Tribunal has also considered photographs and social media posts depicting the parties at home and tending to their vegetable garden. Taken in totality, this evidence substantiates that the parties have been living together since the applicant last entered Australia in April 2017 and for the periods before that where she visited Australia or where the parties were on holiday in Thailand or other parts of South-East Asia.
14. Turning lastly to the sharing of the responsibility for any housework, the parties stated in their undated statement that the applicant took care of cleaning, gardening and maintenance, and cooking due to the sponsor being physically restricted following a number of operations.
15. The Tribunal finds that information concerning the nature of the household indicates that the parties were not living separately and apart on a permanent basis at the time of application and are currently living together. The information also indicates that the parties have been in a genuine and continuing relationship at all material times.

Social aspects of the relationship

16. The Tribunal has considered numerous photographs of the parties with each other and with some third parties. The photographs show the parties in each other's close presence including around these third parties. Several of these third parties and others (such as members of the Bell Post Hill Bowls Club of which both parties are members) have also written letters attesting to the parties' relationship. The letters are for the most part expansive, and cogent reasons are provided to substantiate the declarants' belief that the parties are in a genuine and continuing relationship.
17. The applicant has also submitted evidence of social media posts posted by the applicant. These posts depict the parties during their many trips in Australia and overseas (of which more is below) although some were posted of them at home. Where details of "likes" are visible (some are cut off), these show the posts being "liked" by several people including members of the sponsor's family and the parties' friends.
18. The Tribunal has considered evidence in the form of Centrelink documents, which show the parties representing themselves to this agency as being in a relationship. Although they had been listed for a while as being "married" when this is clearly not true, it accepts that nothing adverse flows from this and it may have been the result of a clerical error. The Tribunal notes that the parties have since corrected their relationship status to "de facto".
19. Finally, the Tribunal accepts that the parties have applied for and received a relationship certificate, which it considers further evidence of them representing themselves to a government agency as being in a de facto relationship.
20. The Tribunal accepts this evidence and finds that the parties represent themselves to others as being in a de facto relationship and that there is wide acceptance of this relationship by their friends and acquaintances.

21. The Tribunal has considered photographs and social media posts depicting the parties during numerous holidays in Australia and overseas and accepts that they have planned and undertaken joint social activities during the period of their claimed relationship. Other evidence in the form of letters from club members shows that they are active members of the Bell Post Hill Bowls Club.
22. The Tribunal finds that the evidence of the social aspects of the parties' relationship firmly points to them being in a genuine and continuing relationship.

Nature of the parties' commitment to each other

23. The Tribunal has benefited from reading the relationship statement that was provided on 29 November 2018. This statement catalogues in great detail the history of the parties' relationship from its claimed inception in 2014. It talks about the various trips made by the parties to visit each other including an extended road trip in Australia in May and June 2015 and some cruises through South-East Asia and East Asia. It goes into some detail about the arrangements made by the parties during the earlier part of their relationship which was conducted by long distance. Finally, it details the circumstances that led to the parties entering into a de facto relationship in August 2016.
24. The Tribunal accepts that the relationship statement is an accurate summary of the inception and development of the parties' relationship. It accepts that they have been in a relationship since at least August 2016 when they considered themselves to be de facto partners but most likely earlier. The Tribunal has found above that the parties have been living together since the applicant last entered Australia in April 2017.
25. Turning to the degree of companionship and emotional support that the parties draw from each other, the Tribunal accepts based on the information in front of it that they are a cohesive unit who engage in activities together such as travelling and lawn bowls. It accepts that during the earlier stages of their relationship they took various opportunities to travel to each other's home countries to stay with one other. It accepts that the applicant, a nurse by profession, has been providing the sponsor with care due to his medical conditions. As above, it accepts that the sponsor had been providing the applicant with money to allow her to attend to her affairs in Thailand, such as her mortgage and other liabilities. The Tribunal has considered the above evidence and finds that the parties draw a substantial degree of companionship and emotional support from each other.
26. Having considered the evidence of the nature of the parties' commitment to each other, the Tribunal accepts that it indicates that they have had a commitment to a shared life together to the exclusion of all others and that they have been in a genuine and continuing relationship at the time of application and at the time of this decision. It accepts that the evidence indicates the parties were not living separately and apart on a permanent basis at the time of application and that they are currently live together.

Are the parties related to each other?

27. There is no evidence that the parties are related to each other by family. The Tribunal accepts that the applicant meets s.5CB(2)(d).
28. On the basis of the above evidence and findings, the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made. The parties had a mutual commitment to a shared life to the exclusion of all others, their relationship was genuine and continuing, they did not live separately and apart on a permanent basis and they were not related to each other at the time of application. Therefore, the parties were in a

de facto relationship for the purposes of s.5CB(2) and the applicant is the de facto partner of the sponsor under s.5CB(1) at that time. The applicant meets cl.820.211(2)(a).

29. The Tribunal is satisfied that the applicant was sponsored by the sponsor at the time of application pursuant to cl.820.211(2)(c)(i). Lastly, the Tribunal accepts that the visa application was made within 28 days after the applicant's previous substantive visa ceased so she is not subject to the Schedule 3 criteria under cl.820.211(2)(d)(ii). Therefore, the applicant meets cl.820.211(2). Because the applicant was not the holder of a Subclass 771 (Transit) visa at the time of application, she meets cl.820.211.
30. The applicant continues to meet the requirements of cl.820.211(2) at the time of decision. She therefore meets cl.820.221(1)(a).
31. There are no sponsorship limitations applicable to the sponsor. Clause 820.221(4)(a) is met and because the sponsor has consented to the disclosure of any relevant conviction, cl.820.221(4)(b) is met. Clause 820.221(4) is met in its entirety and therefore cl.820.221 is met.

Are the additional criteria for a de facto relationship met?

32. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
33. The applicant must have been in the de facto relationship for at least the 12-month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as where, relevantly, the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009).
34. The applicant submitted a document titled "Relationship Certificate" dated 12 January 2023. In submitting this document, she has provided evidence that the parties' relationship is registered under the *Relationships Act 2008* (Vic) as a kind of relationship prescribed in the Acts Interpretation (Registered Relationships) Regulations 2008: r.2.03A(5). Accordingly, the 12-month requirement does not apply.
35. For this reason, the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

36. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl.820.211 of Schedule 2 to the Regulations; and
 - cl.820.221 of Schedule 2 to the Regulations; and
 - r.2.03A.

David Crawshay
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).